Filed 1/25/10 P. v. Rodriguez CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. VERONICA RODRIGUEZ, Defendant and Appellant.	B211696 (Los Angeles County Super. Ct. No. BA299540)

APPEAL from a Judgment of the Superior Court of Los Angeles County. Judith L. Champagne, Judge. Affirmed and remanded.

Marcia C. Levine, under appointment by the Court of Appeal for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, James William Bilderback II and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Veronica Rodriguez appeals her conviction of one count of first degree murder (Pen. Code[1], § 187), seven counts of attempted murder (§§ 187, 664), and one count of shooting at an unoccupied vehicle (§ 246). She contends the trial court erred in permitting the prosecution to make a legally erroneous closing argument on the standard for voluntary manslaughter and that her defense counsel was ineffective in failing to object to the prosecution's argument; and the trial court erred in failing to stay the sentence on her conviction for shooting at an unoccupied vehicle. We affirm, but remand for resentencing.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On February 3, 2006, Nicole Lopez and her friends Melodie Miranda, Amanda Castro and Gia Singerman went to Angelica's Bar on Washington Boulevard in Commerce. They had driven there together about 10:30 p.m. in Lopez's car. There were about 30 or 40 people in the bar. The four women drank beer and socialized.

Lopez had about five beers. About 1:45 a.m., Singerman used the restroom but left her cellular telephone behind. Singerman waited until the next person who had used the restroom came out, and went inside to retrieve her phone, but she was not able to find it. Singerman asked defendant, who had just left the restroom, if she had seen her phone. Defendant responded that she had not; Singerman asked again. She was insistent that defendant had her phone, and asked if she could check defendant's purse. Singerman looked in defendant's purse, but did not see the phone. Lopez patted defendant down but did not find the phone.

Defendant left, and Singerman and her three friends left the bar. Outside, Singerman again accused defendant of hiding her cell phone. Defendant pushed her, saying "I don't have your phone, bitch." Singerman hit defendant, and they started fighting. Lopez went to get her car. Another fight broke out. Security guards from the bar and several other people were trying to break up the fight.

---

[1] All statutory references are to the Penal Code, unless otherwise noted.

Lopez pulled her car up in front of the bar. Lopez got out and tried to break up a fight, and was hit a few times. Singerman had defendant's purse; defendant was trying to get it back. Lopez and her friends got into her car, with Castro in the passenger seat. Lopez saw defendant standing in the middle of the street. Defendant took a gun out of her purse and fired four times at Lopez as she was pulling away. Victor Rivas, who had been a patron in the bar that night, testified at trial that defendant was not the woman in the street with a gun.

Lopez headed towards the freeway, with a large SUV coming towards her at high speed. When Lopez got on the freeway, she saw that the SUV was chasing her. The SUV got ahead of her on the freeway. The rear window of the SUV was rolled down, and Lopez saw defendant inside. Lopez saw that defendant was holding the same gun; defendant began to shoot at Lopez's car, and the SUV sped away. Lopez saw that Castro had blood on her, got off the freeway and stopped the car. She tried to resuscitate Castro. Miranda called 911. The police arrived seven to 10 minutes later. When the paramedics arrived they were unable to save Castro.

Lopez described defendant as the shooter to police as light-skinned, 27 to 30 years old, approximately five feet, five inches tall, with long curly hair, wearing cropped pants, a jacket and a white blouse. Miranda described defendant as a Hispanic female, late 20s or early 30s, with long curly black hair and wearing a white corduroy jacket and beige Capri pants.

Police recovered 9 millimeter shell casings on the street outside the bar and from Lopez's vehicle. Police searched defendant's home, and recovered beige Capri pants from defendant's bedroom closet, a Baretta semiautomatic handgun, and 9 millimeter ammunition, including rare cast lead bullets. The gun found in defendant's bedroom was not the gun used in the shooting. A cast lead bullet was recovered from Castro's body.

The jury found defendant guilty as charged of one count of murder (§ 187, count one), with a finding the murder was in the first degree; seven counts of attempted premeditated murder (§§ 187, 664, counts 2, 3, 4, 6, 7, 8 and 9) with a finding that defendant acted willfully and with premeditation on each count; and one count of

shooting at an occupied motor vehicle (§246, count 5). The jury found all firearm allegations true (count 1, § 12022.5, subd. (a) and § 12022.53, subds. (b)-(d); count 5, § 12022.5, subd. (a), and counts 2 through 4 and 6 through 9 § 12022.53, subds. (b)-(c)).

DISCUSSION

I. THE PROSECUTION'S VOLUNTARY MANSLAUGHTER ARGUMENT TO THE JURY.

Defendant argues the trial court erred in permitting the prosecution to make the legally fallacious argument that voluntary manslaughter was shown where a reasonable person would have killed as a result of the provocation, and erred in failing to instruct the jury sua sponte to correct the prosecution's error. He further contends his counsel was ineffective for failing to object to the argument, and that the error requires reversal because the jury applied the wrong legal standard.

A. Factual Background.

During closing argument, the prosecution told the jury that it could find voluntary manslaughter if defendant were provoked and such provocation would cause a person of average disposition to act rashly. In particular, the prosecution argued:

> So here are the important points under heat of passion. Provocation, is the fight of such a character and degree to excite the passion and the passion as exemplified by [defendant]?
>
> Was the person and the killing done while still under the influence of that passion? In other words, did they act rashly? Did they act without thinking about what they were doing? If not, we have no heat of passion.
>
> What would an ordinary, reasonable person in the same situation do under these facts? Would the average person act that rashly and without thinking if their purse was taken and they recovered it or they were accused of taking a cell phone? How would the same person with the same facts react? Would they go to the car and get a gun and chase them onto the freeway?

> And was there no cooling off period? In other words, the person has to be directly under the influence of that emotion. There is not enough time to cool off, and again, we use the reasonable-person test. Was there not enough time for [defendant] to cool off before she got onto the freeway and shot and killed Amanda Castro? If she was cooled off or the average person would not act the same under these kinds of circumstances, we have no heat of passion. We have no manslaughter.

Defense counsel made no objection to the prosecution's argument. The jury was instructed with CALCRIM 522[2] and 570.[3] The court also instructed the jury with

---

[2] CALCRIM 522 as given provided, "Provocation may reduce a murder from first degree to second degree and may reduce a murder to manslaughter. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. Also, consider the provocation in deciding whether the defendant committed murder or manslaughter."

[3] CALCRIM 570 as given provided, "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion. [¶] The defendant killed someone because of a sudden quarrel or in the heat of passion if: [¶] The defendant was provoked; [¶] As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured (his/her) reasoning or judgment; and [¶] The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment. [¶] Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection. [¶] In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time. [¶] It is not enough that the defendant simply was provoked. The defendant is not allowed to set up (his/her) own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment. [¶] If enough time passed between the provocation and the killing for a person of average disposition to "cool off" and regain his or her clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on this basis. [¶] The People have the burden of

CALCRIM 200 that it was to disregard any comments by the attorneys that conflicted with the instructions.

B. Discussion.

1. Prosecutorial Misconduct.

Voluntary manslaughter is the killing of a human being upon a sudden quarrel or heat of passion. (§ 192, subd. (a).) Although section 192, subdivision (a) refers to "sudden quarrel" or "heat of passion," voluntary manslaughter occurs where the defendant is incited to kill by provocation. (*People v. Manriquez* (2005) 37 Cal.4th 547, 583.) "The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection." (*Id.* at pp. 583-584.) As stated in *People v. Barton* (1995) 12 Cal.4th 186, 201, "Heat of passion arises when 'at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.'"

In *People v. Najera* (2006) 138 Cal.App.4th 212, 223, upon which defendant relies, the prosecution advised the jury that the "reasonable person" standard for provocation was based upon the defendant's conduct, rather than the circumstances surrounding the defendant. The prosecution asked the jury if a reasonable person under the circumstances would stab someone. *Najera* pointed out that, "the focus is on the provocation – the surrounding circumstances – and whether it was sufficient to cause a reasonable person to act rashly. How the killer responded to the provocation and the reasonableness of the response is not relevant to sudden quarrel or heat of passion." (*Id.* at p. 223.) The court found no error because the court correctly instructed the jury on

---

proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder."

voluntary manslaughter and advised it to follow the court's instructions, not the attorneys' description of the law. (*Id.* at p. 224.)

The California Supreme Court has consistently invoked the "general rule [that] a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) However, we will review a claim of prosecutorial misconduct if an admonition would not have cured the harm (*People v. Price* (1991) 1 Cal.4th 324, 447) or a request for admonition would have been futile. (*People v. Hill* (1998) 17 Cal.4th 800, 820.)

To support a claim of prosecutorial misconduct, appellant must show either a pattern of egregious conduct or employment of persuasion methods so deceptive as to create a reasonable likelihood that such behavior prejudicially affected the jury. (*People v. Ochoa* (1998) 19 Cal.4th 353, 427; *People v. Samayoa*, *supra,* 15 Cal.4th at p. 841.) The prosecution's remarks must be considered in the context of the argument as a whole; words and phrases should not be singled out and analyzed without reference to the entirety of the prosecution's argument. (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) We will not lightly infer that the jury drew the most damaging meaning from the prosecution's statements. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1153.) The inquiry focuses on whether there is a reasonable likelihood the jury construed the prosecution's comments in an objectionable fashion. (*People v. Ayala* (2000) 23 Cal.4th 225, 283-284.)

While the prosecution's question whether a reasonable person under the circumstances here – being accused of taking a cell phone -- would react by going to the car, getting a gun and chasing the accusers onto the freeway improperly stressed the defendant's conduct in the face of provocation, we find no grounds for reversal. First, the claim was forfeited by defense counsel's failure to object. Second, the jury was properly instructed both as to voluntary manslaughter and its obligation to ignore the prosecution's argument to the extent it conflicted with the jury instructions. We presume the jury

followed the legally correct instructions given to it. (*People v. Multishaw* (1989) 48 Cal.3d 1001, 1044.) There is thus no reasonable likelihood the jury construed the prosecution's comments in a manner that caused it to misapply the law.

2. Duty to Sua Sponte Instruct.

Defendant contends that the prosecution's argument misled the jury on the test distinguishing murder from manslaughter, and the pattern instructions did not clarify the point because there was no obvious conflict between the prosecution's statements and the jury instructions. In such instance, she argues, there is a duty to give a preclusive instruction, relying on *People v. Green* (1980) 27 Cal.3d 1, 68 (*Green*).

Contrary to defendant's assertion that the trial court must instruct to correct the prosecution's misstatements of the law, *Green* did not hold that the trial court is required to sua sponte provide a preclusive instruction where the prosecution's argument misstates the law. (*Green, supra*, 27 Cal.3d at p. 68.) *Green* held that "when the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilty rested, the conviction cannot stand." *Green* held this general rule also required reversal "when the defect in the alternate theory is not legal but factual, i.e., when the reviewing court holds the evidence insufficient to support the conviction on that ground." (*Id*. at p. 70.)

The error requiring instructions to be given occurs when the case is presented to the jury on an improper theory or inadequate case. No sua sponte instructions are required where, as here, the claimed error arises from the prosecutor's unobjected-to argument. (*People v. Morales* (2001) 25 Cal.4th 34, 43-44.)

3. Ineffective Assistance.

The right to effective assistance of counsel derives from the Sixth Amendment right to assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-694; see also Cal. Const., art. I, § 15.) To demonstrate ineffective assistance, defendant must show (1) counsel's conduct was deficient when measured against the standards of a

reasonably competent attorney, and (2) prejudice resulting from counsel's performance "'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" (*People v. Mayfield* (1997) 14 Cal.4th 668, 784.) Prejudice is shown where there is a reasonable probability, but for counsel's errors, that the result of the proceeding would have been different. (*In re Harris* (1993) 5 Cal.4th 813, 832-833.) Defendant must establish prejudice as a demonstrable reality, and may not rely on speculation as to the effect of the errors or omissions of counsel. (*In re Clark* (1993) 5 Cal.4th 750, 766.)

Our review of counsel's performance is deferential, and strategic choices made after a thorough investigation of the law and facts are " virtually unchallengeable." (*In re Cudjo* (1999) 20 Cal.4th 673, 692.) However, defense counsel has an obligation to investigate all defenses, explore the factual bases for defenses, and evaluate the applicable law. (*People v. Maguire* (1998) 67 Cal.App.4th 1022, 1028.) The defendant "can be expected to rely on counsel's independent evaluation of the charges, applicable law, and evidence, and of the risks and probable outcome of the trial." (*In re Alvernaz* (1992) 2 Cal.4th 924, 933.) "In some cases . . . the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged. In such circumstances, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, these cases are affirmed on appeal. [Citation.] Otherwise, appellate courts would become engaged 'in the perilous process of second-guessing.'" (*People v. Pope* (1979) 23 Cal.3d 412, 426, fn. omitted.) On appeal, if the record shows a rational tactical purpose behind counsel's act or omission, or if the record does not show counsel's purpose but there could be a satisfactory explanation for the act or omission, the judgment will be affirmed. (*People v. Fosselman* (1983) 33 Cal.3d 572, 582; *People v. Pope*, *supra*, 23 Cal.3d at pp. 425-426.) Where the record sheds no light on the purpose behind counsel's acts or omissions, the question of ineffective assistance of counsel more appropriately is resolved by a petition for writ of habeas corpus. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267; *People v. Pope*, *supra*, 23 Cal.3d at p. 426.) Habeas corpus proceedings allow defendant the

opportunity to present additional evidence regarding trial counsel's reasons for acting or omitting to act in the manner of which defendant complains. (*People v. Pope, supra,* at p. 426.)

Here, the record before us does not demonstrate ineffective assistance. Because the trial court properly instructed the jury on the elements of voluntary manslaughter and instructed the jury to follow the jury instructions rather than the argument of counsel where the two conflicted, defense counsel reasonably could have concluded that objecting to the prosecution's argument would not be fruitful. Furthermore, given the jury's conclusion that defendant committed in each instance a willful and premeditated act, which is exclusive of a finding that she acted in heat of passion, it is not reasonably probable the result would have been different if defense counsel had objected.

II. SENTENCING ON COUNT 5 AND FIREARM ENHANCEMENTS.

Defendant contends her sentence on count 5 (shooting at an occupied vehicle) should be stayed pursuant to section 654 because there is no evidence to support a finding she had separate intentions when she fired at the occupied vehicle intending to kill its occupants. The People concede that defendant "may be correct," but contends that the firearm enhancement attached to count 5 must be imposed in full because count 5 was the sole determinate term. The People further contend the firearm enhancements on counts 6 through 9 should be imposed in full because the underlying counts were indeterminate and imposed in full, and that we should remand for resentencing on counts 5 through 9. (*People v. Felix* (2000) 22 Cal.4th 651, 656.) The People concede that imposition of one-third of the term on the firearm enhancements for counts 6 through 9 was improper, but asserts remand is not necessary because the court's announced sentence makes the sentence on the individual counts clear, and because the enhancements were imposed as concurrent sentences. (*People v. Mustafaa* (1994) 22 Cal.App.4th 1305, 1310.)

A. Factual Background.

The trial court imposed a total sentence of 125 years to life plus three consecutive life terms. On count 1 (first degree murder), the court imposed a sentence of 25 years to life, plus 25 years to life for the firearm enhancement, for a total term of 50 years to life.

On Counts 2 through 4 (attempted first degree murder) the court imposed three life sentences, plus 25 years to life for each of the firearm enhancements on those counts, for a total of 75 years to life with three consecutive life terms. On count 5, the court imposed one-third of the midterm (20 months) for the violation of section 246 (shooting at an occupied vehicle), and one-third of the midterm (16 months) for the firearm enhancement for a total of three years. On counts 6 through 9 (attempted first degree murder), the court imposed life sentences on each count, plus six years eight months (one third of 20 years) on each for the section 12022.53, subdivision (c) enhancements, with the sentence on counts 6 through 9 to run concurrently.

B. Discussion.

1. Count 5 Must Be Stayed.

"An act or omission that is punishable in different ways by different provisions of law" shall not "be punished under more than one provision." (§ 654, subd. (a).) "Section 654 bars multiple punishment for separate offenses arising out of a single occurrence where all of the offenses were incident to one objective." (*People v. Lewis* (2008) 43 Cal.4th 415, 519.) Here, the evidence establishes defendant's sole objective was to kill the occupants of Lopez's car in retaliation for Singerman's accusations regarding the theft of her cellphone. Therefore, as the People concede, the sentence on Count 5 must be stayed.[4]

2. Imposition of Full Term on Enhancements.

In *People v. Felix, supra,* 22 Cal.4th 651, the court considered whether enhancements for indeterminate consecutive sentences should be imposed as full terms for additional consecutive indeterminate sentences.[5] (*Id.* at p. 656.) The court concluded that enhancements attached to an indeterminate term are not subject to the determinate

---

[4] Count 5 was the sole determinate term.

[5] In *Felix*, the court also held that life sentences are indeterminate for purposes of the determinate sentencing law. (*People v. Felix, supra*, 22 Cal.4th at p. 659.)

sentencing law, including the provisions of Penal Code section 1170.1.[6] (See *People v. Felix, supra,* 22 Cal.4th at p. 656.) "[S]ection 1170.1 does not apply to a gun-use enhancement attached to an offense which carries an indeterminate term of imprisonment [and therefore] section 1170.1's one-third limit for consecutive subordinate terms and enhancements does not apply." (*Id.* at p. 656; see also, *People v. Ramos* (2004) 121 Cal.App.4th 1194, 1209.) Therefore, "consecutive enhancements are full term for indeterminate crimes, one-third for 'violent' determinate crimes, and not imposed at all for nonviolent determinate crimes. (See § 1170.1, subd. (a).) This pattern is consistent with legislative policy to punish more serious crimes more severely." (*People v. Felix, supra,* at p. 656.)

3. Remand for Resentencing.

An unauthorized sentence may be corrected at any time. (*People v. Smith* (2001) 24 Cal.4th 849, 854.) "[A] sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case." (*People v. Scott* (1994) 9 Cal.4th 331, 354.) In such circumstances, "[a]ppellate courts are willing to intervene in the first instance because such error is 'clear and correctable' independent of any factual issues presented by the record at sentencing." (*Ibid.*) When we set aside an unauthorized sentence on appeal, a more severe sentence may be imposed. (See *People v. Serrato* (1973) 9 Cal.3d 753, 763-764; *People v. Craig* (1998) 66 Cal.App.4th 1444, 1449.)

Because Count 5 was the sole determinate term, we remand for resentencing including staying that count. "[W]hen one term is determinate and the other is indeterminate, neither is principal or subordinate; instead, each is calculated without

---

[6] The determinate sentencing scheme includes section 1170.1, subdivision (a), which directs that "[t]he subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses." As used in section 1170.1, the term "specific enhancements" includes the enhancements provided in section 12022.53. (§ 1170.11.)

reference to the other." (*People v. Reyes* (1989) 212 Cal.App.3d 852, 858; Cal. Rules of Court, rule 4.451(a).) Because count 5 was the only count with a determinate term, the trial court should have chosen among the high, mid and low terms and imposed its choice in full, and the matter should remanded to permit the trial court to exercise its discretion. (*People v. Keelen* (1998) 62 Cal.App.4th 813, 820.)

The indeterminate sentences on counts 6 through 9 were not subject to the limitations of section 1170.1 limiting the firearm enhancements to one-third of the term. We reverse the sentences, and instruct the trial court, on remand, to correct the judgment to reflect imposition of the full term for the section 12022.53, subdivision (c) enhancements concurrently on each of those counts.

DISPOSITION

The matter is remanded for re-sentencing in accordance with this opinion. In all other respects, the judgment is affirmed.

ZELON, J.

We concur:

WOODS, Acting P. J.

JACKSON, J.